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TERA VA SDN BHD v. AYAM BINTANG ISTIMEWA SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
CHE MOHD RUZIMA GHAZALI JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NOS: B-02(C)(A)-1948-11-2023
& B-02(C)(A)-1949-11-2023]
24 SEPTEMBER 2024

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Abstract – *(i) A tenant has the right to bring a cross-claim for damages to a premises, even if he does not own the said premises, owing to the fact that the tenant has exclusive possession of the premises and, therefore, has a duty to maintain the premises to be in good condition; (ii) An adjudicator has jurisdiction to consider a cross-claim, but cannot award an amount that exceeds the original claim.*

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CONSTRUCTION LAW: *Adjudication – Claim for payment – Claimant claimed against respondent in adjudication proceedings – Respondent filed cross-claim – Claimant unsuccessful in claim and ordered to make payment to respondent arising out of cross-claim – Whether there was fraud, misrepresentation and breach of natural justice – Whether adjudication decision ought to be set aside – Construction Industry Payment and Adjudication Act 2012, s. 15(a), (b)*

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CONSTRUCTION LAW: *Claims – Cross-claim – Claimant claimed against respondent in adjudication proceedings – Respondent filed cross-claim – Claimant unsuccessful in claim and ordered to make payment to respondent arising out of cross-claim – Whether respondent could file cross-claim in response to claimant's adjudication claim – Whether cross-claim could exceed claimant's claim – Whether respondent had become substantive claimant – Whether adjudicator acted in excess of jurisdiction in allowing respondent's cross-claim – Construction Industry Payment and Adjudication Act 2012, s. 15(d)*

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The respondent, Ayam Bintang Istimewa Sdn Bhd ('ABI'), had appointed the appellant, Tera VA Sdn Bhd ('TVA') to supply, deliver and install a Solar Photovoltaic Solution ('SPS') at a factory ('premises'), pursuant to an agreement embodied in two quotations signed by ABI ('contract') where the total contract sum with 278.10KWp was RM613,000. The performance of the contract was divided into two phases; phase 1 for 168.3 KWp at RM393,000 and phase 2 for 109.89 Kwp at RM220,000. TVA contended that: (i) it had completed phase 1 but was only paid RM98,250; and (ii) ABI had breached the contract for failing to pay for the work done for phase 1, amounting to RM294,750. ABI, on the other hand, argued that TVA: (i) refused and/or omitted to fulfil/complete its duties and obligations in the

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contract; (ii) failed to perform the duty of care during the installation and/or construction of the solar panel at the premises, leading to structural damage to the zinc panels measuring the size of 20,565 square feet. TVA proceeded to issue its payment claim against ABI for unpaid works done, in the amount of RM294,750, and its notice of adjudication. In its adjudication response, ABI counterclaimed/set-off for the amount of RM695,580, which included the cost to replace the existing damaged roofing. At the conclusion of the adjudication, it was decided that TVA had not succeeded in their overall claim. At the High Court, TVA applied to set aside the adjudication decision while ABI applied to enforce the same. The grounds relied on by TVA for its setting aside application were: (i) there was fraud, namely that ABI had misled the adjudicator into believing that the entire roof had been damaged and that it had replaced the roof and paid for the cost. It was further alleged that ABI did not reveal to the adjudicator that the premises did not belong to it but was, in fact, rented; and (ii) there was a denial of justice where the adjudicator was said to have decided on a matter not submitted by the parties, concerning the rate for the cost of rectification, and had arrived at a conclusion without giving TVA the opportunity to address the matter. The Judicial Commissioner ('JC') allowed ABI's application and dismissed TVA's application. Hence, the present appeals by TVA, against the JC's decision in: (i) allowing ABI's application to enforce the adjudication decision ('Appeal 1948'); and (ii) dismissing TVA's application to set aside the adjudication decision ('Appeal 1949').

Held (dismissing Appeals 1948 and 1949)
Per See Mee Chun JCA delivering the judgment of the court:

(1) According to TVA, the concealment by ABI that it was not the owner of the premises but a tenant, was significant as ABI was claiming for damages to the premises which it did not own; the concealment went towards ABI's *locus standi* and had led to the adjudicator allowing ABI's cross-claim. It was not disputed that ABI was not the owner of the premises but a tenant. This was evident from the land title and the tenancy agreement between the landlord and ABI who was described as a tenant. The adjudicator had allowed ABI's cross-claim on the damaged roof premised on TVA having the duty of care towards ABI when installing the SPS at the premises. ABI, being the tenant, had a duty under the tenancy agreement to keep the premises in clean and good condition and, at the end of the tenancy, to restore it to the condition it was in. This meant that any damage arising in the course of tenancy had to be made good by ABI. In any event, as a tenant, ABI had exclusive possession of the premises. Hence, possession carried with it the right to bring a cross-claim for cost of repairs to the damaged roof. The fact that ABI was not the owner of the premises was thus irrelevant. (paras 35 & 38-42)

(2) A perusal of the paragraphs in ABI's adjudication response would show no such misrepresentation where it was essentially stated that the contractors had to be engaged to observe and rectify where the costs were as stated. There was no suggestion that such out of pocket expenses had been expended. The words 'incurred or to be incurred' did not amount to saying that 'incurred' was for costs and repair and 'to be incurred' was for investment tax allowance. (para 44)

(3) TVA attempted to produce some photographs taken after the adjudication decision to go as far as to show that the roof was never replaced and there was no damage as the roof was already in such a condition prior to the installation of the SPS. This was rightly dismissed by the JC who found that the validity of the photographs was not proven, there was no digital date and they were taken at an above eye-level with no clarity. TVA's own letter to ABI negated what TVA said to be misrepresentation. (para 48)

(4) ABI's rate was already available to TVA. As noted by the adjudicator, ABI had notified TVA that the cost of replacement was RM12 psf. The adjudicator too had not come across any letter from TVA to ABI on any quotation prior to the proceeding. TVA had never, in its adjudication claim and reply, stated that the quotation was from the contractor who had originally installed the roof at the premises and failed to explain that the original roof was 0.35mm. It also had not explained that the quotation included insulation. This contrasted with that of ABI's rate which clearly stated it included installation. Hence, the adjudicator stated that 'Considering the limited information given by the claimant, I will adopt the rate provided by the respondent as the cost of the rectification.' This could not be a breach of natural justice in the sense that the adjudicator did not hear both sides of the dispute. Here, the adjudicator had not deprived both parties the right to adduce evidence and to submit on any issue. It was only after the adjudication proceeding that TVA was saying it should have been given the opportunity to explain further its rate when it did not address the adjudication that its quotation came from the original contractor. This essentially boiled down to a dissatisfaction on the findings made by the adjudicator which did not amount to a breach of natural justice. (paras 55-56 & 58)

(5) ABI can indeed file a cross-claim in responding to TVA's claim. As the cross-claim can only reduce or zerorise TVA's claim and could not exceed TVA's claim, the adjudicator had acted in excess of jurisdiction to find that 'the outstanding amount due to the claimant (TVA) is (7,830)'. This would bring it within the ground in s. 15(d) of the Construction Industry Payment and Adjudication Act 2012 where an adjudicator decision could be set aside on the ground that 'the adjudicator had acted in excess of its jurisdiction'. However, this was not

relied on as a ground for the setting aside application. There was jurisdiction for the adjudicator to consider the issue of cross-claim but not to render an award where the cross-claim exceeded the claim itself. Although the issue of whether the cross-claim can exceed the claim was allowed as a legal point to be raised, this ultimately resulted in an excess of jurisdiction situation, which ground, however, was not pleaded for a setting aside. Further, the issue of excess of jurisdiction was not raised in the memorandum of appeal. (paras 66, 81 & 83)

(6) As TVA had not succeed in its setting aside of the adjudication decision on grounds of fraud or denial of natural justice, that adjudication decision, including allowing the cross-claim, remained valid. Appeal 1949 was dismissed. It followed that Appeal 1948 ought to be likewise dismissed. (paras 60 & 86)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] CLJU 1522; [2016] 1 LNS 1522 CA ***(refd)***

Bouygues UK Ltd v. Dahl-Jensen UK Ltd [1999] Lexis Citation 3672 ***(refd)***

Chong Nge Wei & Ors v. Kemajuan Masteron Sdn Bhd [2022] 4 CLJ 833 FC ***(refd)***

Geldof Metaalconstructie NV v. Simon Carves Ltd [2010] EWCA Civ 667 ***(refd)***

Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd [2019] 2 CLJ 229 CA ***(refd)***

Ireka Engineering And Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal [2019] CLJU 51; [2019] 1 LNS 51 CA ***(refd)***

KPF Niaga Sdn Bhd v. Vigour Builders Sdn Bhd & Another Case [2021] CLJU 141; [2021] 1 LNS 141 HC ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2018] 2 CLJ 163 CA ***(refd)***

Mudajaya Corporation Bhd v. KWSL Builders Sdn Bhd & Other Cases [2022] MLJU 1931 ***(refd)***

SG South Ltd v. King's Head Cirencester LLP & Anor [2009] EWHC 2645 ***(refd)***

Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***

Tenaga Poly Sdn Bhd v. Crest Builder Sdn Bhd (KLHC Originating Summons No: WA-24C-44-06-2016) (Unreported) ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 5, 6, 12(5), 13(a), 15(a), (b), (d) 25(d), 27(1)

Other source(s) referred to:

Lam Wai Loon & Ivan YF Loo, *Construction Adjudication in Malaysia,* Sweet & Maxwell, 2nd edn, pp 142 & 143

Sundra Rajoo, Leong Hong Kit & Cindy Wong Xien Yee, *Law, Practice and Procedure of Adjudication,* LexisNexis, vol 1, p 68

A *For the appellant - Richard Kok Chi Wei & Ho Yi Hun; M/s Richard Kok*
For the respondent - Loh Yeow Khoon & Teng Ai Wen; M/s Wong & Loh

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons Nos: BA-24C-55-08-2023 & BA-24C-60-08-2023) (affirmed).]

B *Reported by Najib Tamby*

JUDGMENT

See Mee Chun JCA:

Introduction

C **[1]** This appeal arises out of an adjudication claim where the appellant was the claimant in an adjudication proceeding against the respondent. However, the respondent filed a cross-claim and this resulted in the appellant being ordered to make payment to the respondent. This therefore raises the question of whether the respondent in this appeal, in responding to the
D appellant's adjudication claim, can file a cross-claim and if so, whether the cross-claim can exceed the appellant's claim thereby making the respondent the substantive claimant.

[2] There are two appeals which were heard together, namely Civil Appeal No. B-02(C)(A)-1948-11-2023 ("Appeal 1948") and Civil Appeal
E No. B-02(C)(A)-1949-11-2023 ("Appeal 1949"). The appellant in both appeals is the plaintiff (Tera Va Sdn Bhd/TVA) while the respondent is the defendant (Ayam Bintang Istimewa/ABI).

[3] For the purpose of these appeals, the appellant will be referred to as "TVA" while the respondent will be referred to as "ABI". All references to
F enclosures are to Appeal 1949, unless otherwise indicated.

[4] Appeal 1948 is the appeal against the decision of the learned Judicial Commissioner (JC) to allow the application by ABI to enforce the adjudication decision dated 6 June 2023. Appeal 1949 is the appeal against the decision of the learned JC to dismiss the application by TVA to set aside
G the aforesaid adjudication decision.

Background Facts

The SPS Contract

H **[5]** ABI had appointed TVA to supply, deliver and install a Solar Photovoltaic Solution (SPS) at a factory in Kuantan Pahang (the premises). This was pursuant to an agreement embodied in two quotations signed by ABI on 11 August 2021 (the contract) wherein the total contract sum with 278.10 KWp was RM613,000. The performance of the contract was divided into two phases, phase 1 for 168.3 KWp at RM393,000 and phase 2 for
I 109.89 KWp at RM220,000.

[6] TVA contended that ABI had breached the contract for failing to pay for the work done for phase 1 amounting to RM294,750. According to TVA, it had completed phase 1 but was only paid RM98,250.

[7] ABI countered that TVA had refused and/or omitted to fulfil/complete its duties and obligations in the contract. In particular, it was said that TVA had failed to perform the duty of care during the installation and/or construction of the solar panel at the premises, leading to structural damage to the zinc roof panels measuring the size of 20,565 square feet.

Adjudication Proceedings

[8] On 16 December 2022, TVA issued its payment claim against ABI for unpaid work done of RM294,750. On 9 January 2023, TVA issued its notice of adjudication.

[9] ABI issued its payment response dated 30 December 2022 and its adjudication response dated 12 May 2023. In its adjudication response, ABI had a set-off/counterclaim for RM695,580 which included the cost to replace the existing damaged roofing. ABI said it had to engage its contractors to observe and rectify the damage suffered.

[10] The adjudication decision was as follows (encl. 12/51):

> **Adjudicated Amount**
>
> In the given circumstances, my decision is that the Claimant has **not succeeded** in their overall claim. The breakdown of my decisions is as follows:

Item	Description of Works Done	Amount (RM)	Total Amount (RM)
1.	Outstanding work-done	294,750.00	
2.	**Cross-claims** a) Replacement of metal roofing works b) Supply materials and labours to repaint warehouse	 (286,780.00) (15,800.00)	
	Outstanding amount due to Claimant		(7,830.00)

At The High Court

[11] Arising from the adjudication decision, TVA filed its application to set aside and ABI filed its application to enforce, and thereafter TVA filed the subsequent appeals.

[12] The grounds of judgment (GOJ) of the learned JC can be found in encl. 12/29-41.

[13] With regard to the setting aside application, the learned JC stated it was premised on fraud and denial of natural justice as per s. 15(a) and (b) of the Construction Industry Payment and Adjudication Act 2012 (CIPAA).

[14] The learned JC considered the issue of fraud as alleged, namely that ABI had misled the adjudicator into believing the entire roof had been damaged and that it had replaced the roof and paid for the cost. The learned JC found that the photographs which purported to show no replacement work and minimal damage, had not been proved. This was because the photographs were taken at an above eye-level with no clarity. There were also no digital dates marked on any photograph and the claim it was taken on 17 August 2023 was thus unsubstantiated. Refer to paras. 23 to 25 GOJ.

[15] The other issue on fraud related to ABI not revealing that the premises did not belong to it but was in fact rented. The learned JC held as follows in encl. 12/36-37:

> [27] Being a tenant of a property does not mean that one can cause damage to the property and not bear the responsibility for the same only because one does not own the property. A tenant will have to make good such damages at its own costs as there is a duty of care owed as per the terms and conditions of a Tenancy Agreement. As such, AB's response to this allegation is accepted by this court.

[16] The next ground for setting aside was the allegation of a denial of justice, where the adjudicator was said to have decided on a matter not submitted by the parties and had come to a conclusion without giving TVA the opportunity to address the matter. This matter concerned the rate for the cost of rectification. In para. 32 GOJ, the learned JC stated that since the rate was provided by ABI in the adjudication response, TVA could have responded in its adjudication reply. The adjudicator had used all information made available to arrive at the conclusion that TVA was not denied the right to be heard. This was because the adjudicator had deliberated on all the issues raised by parties and provided them their opportunities to state their case (para. 33 GOJ). In addition, the adjudicator has the power to inquisitorially take the initiative to ascertain the fact and the law required for the decision, as provided in s. 25 of the CIPAA.

[17] The learned JC further stated the following:

> [34] I refer to the case of *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn. Bhd.* [2015] 8 CLJ 728 where it was stated as follows:
>
> > ... Section 15 has provided limited grounds on which the decision of the Adjudicator may be set aside. Since an application under s. 15 is not an appeal, the decision of the Adjudicator cannot be reviewed on merits.

[35] As such, whether the Adjudicator had assessed the issues raised correctly or not is not up to this court to determine as the decision of the Adjudicator cannot be reviewed on its merits.

[18] As TVA has failed to establish s. 15(a) and (b) of the CIPAA, the application to set aside was dismissed.

[19] On the enforcement application, the learned JC was guided by the decision of this court in *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229 on the conditions to grant leave to enforce. These conditions are that the adjudication decision is in favour of the party applying to enforce; the party against whom the adjudication decision is made has failed to pay; and there is no prohibition on the court's discretionary power to grant leave to enforce. The three conditions having been satisfied, and since the setting aside was dismissed, ABI's application to enforce the adjudication decision was therefore allowed.

Our Decision

[20] We do not propose to set out the submissions of TVA and ABI separately but will deal with them in the course of our decision.

Appeal 1949 – Setting Aside

[21] We will first consider Appeal 1949, which is the setting aside.

[22] Section 13(a) of the CIPAA provides as follows:

> **Effect of adjudication decision**
>
> 13. The adjudication decision **is binding unless** -
>
> (a) **it is set aside by the High Court on any of the grounds referred to** in section 15; (emphasis added)

[23] The application to set aside the adjudication decision was premised on s. 15(a) and (b) of the CIPAA, which reads as follows:

> **Improperly procured adjudication decision**
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> 15. An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was **improperly procured through fraud** or bribery;
>
> (b) there has been **a denial of natural justice**; (emphasis added)

[24] These relate to an improperly procured adjudication decision being set aside on the grounds of being procured through fraud and denial of natural justice.

A **Fraud**

[25] The two fraudulent acts are set out in paras. 2 and 3 of TVA's memorandum of appeal (encl. 12/17 and 19). In para. 2, it was said as follows:

B 2. That the learned Judicial Commissioner erred in law and in fact in failing to consider that the Respondent ("ABI") had concealed facts from the Adjudicator and these concealment amount to willful acts of dishonesty and are therefore fraudulent.

C (a) ABI claimed a sum of RM302,580.00 for the roof of the factory for TRV's negligence, but it did not disclose that it was not the owner of the factory.

[26] Paragraph 3 next sets out the following:

D 3. That the learned Judicial Commissioner erred in law and in fact in failing to consider that ABI had concealed facts from the Adjudicator and these concealment amount to willful acts of dishonesty and are therefore fraudulent. ABI had misled the Adjudicator by saying that it had replaced the roof and that it had incurred costs to do so.

[27] ABI contended that the arguments of TVA on this are tantamount to E an appeal and a review of the merits of the case, which is not allowed in law. Reference was made to *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] CLJU 1522; [2016] 1 LNS 1522 and *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2018] 2 CLJ 163, both of which are decisions of this court.

F **[28]** In *ACFM*, it was said as follows:

[21] There were no complaints by the Appellant that the adjudicator had got the disputes on a completely wrong footing. In fact, no complaint was made at all and the adjudication process was carried out premised on those issues. If we were to consider the complaints G of the Appellant, we would be looking into the merits of the decision of the adjudicator. In the context of section 15 of CIPPA 2012, *it cannot be the function of the Court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The Court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed* H *an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the Appellant.* In the context of this case, the complaints of the Appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us.

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[24] This was simply a case where the losing party was not happy that it had obtained an unfavourable decision and tried its chance in the judicial system. *The law as it exists now correctly limits the Court's functions which expressly do not include to review the correctness of the adjudicator's decision*. As pointed by the learned judge, *the Court's intervention is only in very exceptional circumstances which are far and few in between. The prima facie view of the Court must be to affirm the adjudicator's decision unless the losing party can show that it had complied with the thresholds listed in section 15 of CIPPA 2012*. (emphasis added)

[29] In *Martego*, the following was said at p. 182:

[55] The courts' power to set aside adjudicators' decision is circumscribed by statute in s. 15 CIPAA 2012 and it is not a provision which allows the courts to sit in an appellate jurisdiction. *The grounds which the courts can rely on to set aside the adjudicator's decision are limited such that the courts are not allowed to look into the merits of parties' case. The courts' prima facie duty must be to uphold the adjudicator's decision and not to look at it with a fine-tooth comb with the aim to find the faults in the adjudicator's decision. As long as the learned adjudicator had approached his task by adhering to the due process of his adjudication, the courts will not interfere.* Only with this approach by the courts, will the aim of CIPAA 2012 of providing a regime to alleviate the cash problem faced by contractors in the building industry be addressed and achieved. (emphasis added)

[30] As noted in ACFM (per para. 24 of the judgment), there can be court intervention but in very exceptional circumstances where the *prima facie* view must be to affirm the adjudicator's decision unless the losing party can show it had complied with the thresholds listed in s. 15.

[31] We find that there is room for us to review the evidence and set aside the adjudication decision where the circumstances, exceptional they may be, warrants it.

[32] In an instance of an allegation of fraud, it was said in *SG South Ltd v. King's Head Cirencester LLP & Anor* [2009] EWHC 2645 at paras. 20 and 21 that:

20 Some basic propositions can properly be formulated in the context *albeit* only of adjudication decision enforcements:

(a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.

(b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.

(c) *A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.*

(d) Addressing this latter case, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it. Examples of the first category are where it is later discovered that the certificate upon which an adjudication decision is based is discovered to have been issued by a certifier who has been bribed or by a certifier who has been fraudulently misled by the contractor into issuing the certificate by a fraudulent valuation. Examples of the second category are fraud on another contract or cross claims arising on the contract in question which can only be raised by way of set off or cross claim. Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of [HGCRA] that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud; fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement.

21 In formulating and applying these propositions, courts need to be aware and take into account what goes on construction sites up and down the country. On numerous occasions, contractors and subcontractors and even consultants will submit bills or invoices which are or are believed by the recipient to overstate the entitlement. Whilst there are some "cowboy" and fraudulent builders who prey on the public, it will only rarely be the case that one can presume fraud to have taken place where an invoice or bill is overstated. The claiming party may believe that it is entitled to what it is claiming; there may be a simple and honest mistake in the formulation of the claim; the claim may be based on a speculative but arguable point of law or construction of the contract. In none of these cases can it be said that there was fraud on the part of the claiming party. *The Court should be astute and cautious on adjudication enforcement applications in assessing pleas of fraud by the party against whom the adjudication decision has been made. I doubt very much whether there will be any significant number of challenges to enforcement on the basis of fraud.* (emphasis added)

[33] *KPF Niaga Sdn Bhd v. Vigour Builders Sdn Bhd & Another Case* [2021] CLJU 141; [2021] 1 LNS 141; [2021] MLJU 229 referred to *SG South* and said at paras. 62 to 65 as follows:

> [62] … However, for purposes of s. 15(a) CIPAA, "fraud" has a distinctive meaning as compared to the definition in the context of contract law as set out in s. 17 CA 1950. In the circumstances, this Court is very much assisted by the legal principles as propounded in SG South which can be applied to the present application.
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> [63] It is my considered view that Vigour's conduct in concealing the fact that it does not possess a valid certificate of registration under the CIDB Act and selecting only parts of the WA Messages, which would otherwise prove that the correct amount of Claycrete was not used for the road, and yet submitting its claims to KPF for the CIDB Levy and the Claycrete Road, amount to wilful acts of dishonesty and are therefore fraudulent.
>
> [64] I further find that the fraudulent behavior, acts or omissions raised by KPF in this application fall under the category of fraudulent behavior, acts or omissions which were not raised as a defence in the adjudication but which emerge afterwards. In this situation, the question then is whether the fraud directly impacts on the subject matter of the said AD.
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> [65] Hence, it is now necessary for the Court to scrutinise the findings and reasons of the Adjudicator as outlined in paras 153 to 202 in the said AD. The relevant conclusions made by the Adjudicator which are directly related to the issue at hand are as follows: …

[34] The allegation of fraud lies in concealment and two misrepresentations that are said to be made by ABI to the adjudicator.

Concealment That ABI Was Not The Owner Of The Premises But A Tenant

[35] It is not disputed that ABI was not the owner of the premises but a tenant. This is evident from the land title (encl. 11/98) and the tenancy agreement (TA, encl. 11/100-102) between the landlord and ABI, who is described as the tenant. According to TVA, this concealment is significant as ABI is claiming for damage to the premises, which it does not own. The concealment goes towards ABI's *locus standi* and lead to the adjudicator allowing ABI's cross-claim. The claim by ABI as a tenant was a pure economic loss which was not allowed by law.

[36] ABI raised the issue that this had not been raised during the adjudication and TVA is thus not allowed to raise this issue in the setting aside. It referred to the textbook *Law, Practice and Procedure of Adjudication* vol. 1 by Sundra Rajoo, Leong Hong Kit and Cindy Wong Xien Yee, LexisNexis at p. 68:

> [19-85] Likewise, the aggrieved party in adjudication cannot raise a new argument to set aside an adjudication decision.
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> …
>
> [19-87] However, parties are not allowed to raise new arguments in the setting aside application that had not been raised in the adjudication proceedings. The *rationale* being that no party should be allowed a second bite at the dispute.

A …

> [19-87] As such, a party is not allowed to further elaborate or improve its arguments in the setting aside application under Section 15 of CIPAA 2012.

B **[37]** We are of the considered opinion that this issue can be raised during the setting aside as *locus* deals with the right to sue and whether ABI can have the standing to bring the cross-claim.

[38] However, we find the issue of ownership as opposed to tenancy to be irrelevant for the following reasons.

C **[39]** Firstly, the adjudicator had allowed ABI's cross-claim on the damaged roof premised on TVA having the duty of care towards ABI when installing the SPS at the premises. Reference may be made to the adjudication decision under the heading "To Replace …" para. c at encl. 12/50 as follows:

> D It is crucial to emphasize that the Claimant has a duty of care towards the Respondent's property while carrying out the Contract works. Based on the aforementioned evidence, I have determined that the total affected area is 20,565 sft. Considering the limited information provided by the Claimant, I will adopt the rate provided by the respondent is adopted for the cost of the rectification. Therefore, I allowed the
> E Respondent's cross claim for the replacement of the new roof, insulation and the cost for dismantle and reinstate back the Solar Panels, amounting RM286,780.00.

[40] Further, we agree that ABI being the tenant has a duty under art. 14 of the TA (encl. 11/101) to keep the premises in clean and good condition and at the end of tenancy, to restore it to the condition it was. This means
F that any damage arising in the course of tenancy has to be made good by ABI.

[41] In any event, as a tenant, it is trite that ABI has exclusive possession of the premises. In *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508, it was stated at p. 575:

> G Against the allegation of the 5th defendant causing nuisance, the first point raised by the 5th defendant is that the plaintiffs do not have sufficient interest in their properties to bring such a suit under this cause of action; the plaintiffs are not registered owners of the land on which their apartments are built and they do not possess strata title to their lot.
> …
> H … As possession is the only criterion for this rule and not the requirement of being a registered owner then, the plaintiffs amply qualify. The plaintiffs certainly do have exclusive possession of their respective properties and thus, possess every right to bring this action for nuisance.

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Hence, possession carries with it the right to bring a cross-claim for cost of repairs to the damaged roof.

[42] The fact that ABI was not the owner of the premises is thus irrelevant.

Misrepresentation That ABI Had Incurred Out-of-pocket Expenses To Repair The Roof

[43] The essence of this issue lies in paras. 21.9 and 35 of ABI's adjudication response where ABI "had to engage its contractors to observe and rectify the damaged area wherein the repair and rectification costs for the damaged area and the total losses suffered are…" and "… to the claimant's claim shall be deducted, set-off and/or zerorised for the out-of-pocket expenses incurred or to be incurred … comprising of the costs for repair and rectification at the damaged area … as well as the investment tax allowance …". TVA added that ABI used the words "out-of-pocket expenses incurred for the costs for repair and rectification of the roof and "to be incurred" for the investment tax allowance.

[44] A perusal of those paragraphs would show no such misrepresentation where it essentially stated that contractors had to be engaged to observe and rectify where the costs are as stated. There is no suggestion that such out-of-pocket expenses had been expended. The words "incurred or to be incurred" does not amount to saying that "incurred" was for costs and repair and "to be incurred" was for investment tax allowance.

Misrepresentation On The Damage

[45] This misrepresentation relates to how much of the roof had been damaged, 20,565 sq ft or 7,44275 sq ft (TVA's version).

[46] We need only refer to TVA's own letter dated 5 October 2022 to ABI, and in particular para. 2, (encl. 11/110) as follows:

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A

B

TERA VA SDN. BHD. (929247-P)
LOT 3A-2 STREET WING SUNSURIA AVENUE
PERSIARAN MAHAGONI POTA DAMANSARA PJU 5
47810 SELANGOR DARUL EHSAN
Tel : +603-6151 8236 Fax : +603-6151 9236 Email : enquiry@terava-group.com

VASOLAR

C

Our ref : TSB/ABISB/MGTC/03
Date : 5th October 2022

AYAM BINTANG ISTIMEWA SDN BHD
PT 6546, Jalan BDK 3/7
Bandar Damansara Kuantan
26100 Kuantan Pahang

Attn : Mr Ng Theam Lun

D

Dear Sirs,

RE: URGENT: 1) DEBT DUE AND OUTSTANDING OF RM 297,750.00 BEING THE REMAINING 75% OF THE SYSTEM'S PURCHASE PRICE; AND
2) TAX EXEMPTION FOR GREEN TECHNOLOGY PROJECT.

E

We refer to our letter dated 3 October and your reply dated 4 October 2022.

In addressing your concern on the repair and/or replace, where necessary to the damaged roof, we shall hereby conclude that the total affected area measuring 20,565 sqft shall be repaired and/or replaced at Tera's cost. Works for this matter will be scheduled accordingly upon receiving full payment of the outstanding amount due immediately.

F

Pursuant to the signed order dated 30 October 2020, the agreed payment terms are 25% upon MIDA submission and 75% upon Testing and Commissioning. As the System had already Commissioned since September 2021, we would require a signed Testing and Commissioning Report to be submitted to MIDA for the application of the Green Investment Tax Allowance (GITA).

KINDLY TAKE NOTE that the submission to MIDA for the GITA and repair works to the affected damaged roof is entirely dependent on your full payment of the remaining 75% of the System's Purchase Price. As such, kindly remit the said payment immediately to enable us to expedite the required works.

G

Lastly, while there are no attachments whatsoever as stated in Item 5 of your letter, we enclose herewith:-

1) The affected rooftop highlighted; and
2) The Testing and Commissioning Report for your kind signature. Kindly sign and return it to us urgently;

We trust that the above is clear and look forward to your immediate payment.

Meanwhile, we reserve all our rights.

H

Thank you.

Yours faithfully,
TERA VA SDN. BHD.

I

LEONG JIT MIN
Managing Director

[47] This letter clearly shows that TVA had itself stated that the total affected area, which is the damaged roof was 20,565 sq ft.

[48] TVA also attempted to produce some photographs taken on 19 August 2023 (encl. 11/77-96), after the adjudication decision to go as far as to show that the roof was never replaced and there was no damage as the roof was already in such a condition prior to the installation of the SPS. This was rightly dismissed by the learned JC, who found that the validity of the photographs was not proved, there was no digital date and they were taken at an above eye-level with no clarity. Every picture tells a story but not in this instance. The very fact of the letter dated 5 October 2022 negates what TVA says to be a misrepresentation.

[49] This court had raised the issue of whether there can be fraud to claim the cost of repair based on a quotation. Here, ABI had relied on the quotations in encl. 11/54-55. We find that this does not amount to fraud and refer to the Federal Court decision of *Chong Nge Wei & Ors v. Kemajuan Masteron Sdn Bhd* [2022] 4 CLJ 833; [2022] 3 MLJ 135, where a quotation was accepted as proof of damages. At pp. 848 to 851 (CLJ); pp. 150, 151 and 154 (MLJ), this was said:

> [43] *There is no question that the appellants must prove their losses* and 'it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it'. (*Bonham Carter v. Hyde Park Hotel Ltd* (1948) 64 TLR 177 at p 178). That is also trite law. *But the appellants' claim for damages does not suffer from that infirmity. They have provided proof of the damages by producing a quotation prepared by a building contractor to support their claims* for the cost of replacing the flexcore with autoclaved aerated concrete building block.
>
> …
>
> [59] Applying the principles in the two cases to the facts of the present case, *the appellants were prima facie entitled to the cost of replacing the flexcore with autoclaved aerated concrete building block as would put them in a position to have the building material they contracted for, and the quotation provided prima facie proof of the sum* 'which will meet the costs' of the remedial works, which includes dismantling of the existing walls. (emphasis added)

Breach Of Natural Justice

[50] The contention of TVA is that there been a breach of natural justice when the adjudicator considered three issues which were not raised by either party and came to her conclusion. This allegedly deprived TVA of the opportunity to address the adjudicator on these issues and amounted to a breach of natural justice. These issues relate to the thickness of the roof; insulation; and the length and brand of the roof. Ultimately, this had a bearing on the rate of RM12 psf used by the adjudicator, which was that of ABI's, instead of RM4 psf provided by TVA.

[51] The essence of TVA's submission is that its RM4 psf was dismissed as 0.35mm roof is not industry standard and the adjudicator assumed it did not include insulation and accepted RM12 psf without knowing if it was for 0.35mm thickness or otherwise. The adjudicator also considered length and brand when ABI's quotation did not provide for length and neither quotation mentioned brand.

[52] The adjudicator's decision on this can be found in encl. 12/50 as follows:

> **To Replace the damaged metal roofing with new insulation RM286,780.00**
>
> a) I have taken note of the Claimant's letter dated 5th October 2022, which is attached in the Annexure R14 of Respondent's Bundle of Documents. In the letter, the Claimant agrees to repair/or replace the damaged roof at their own cost. The total affected area is determined to be 20,565 sft. Furthermore, On 1st November 2022, the Respondent notifies the Claimant that the cost of replacing the damaged roof as quoted by local vendor is RM12.00/sft. Additionally, the cost of dismantling and installing back the Solar Panels is states to be RM40,000.00. The quotations are attached in the Annexure R8 of the Respondent's Bundle of Documents.
>
> b) *I did not come across any letter issued by the Claimant to the Respondent on the quotation regarding the rectification rate and total affected area prior to the Adjudication proceeding.* Additionally, the quotation attached by the Claimant in the Appendix 11 of the Adjudication Reply stated that metal roofing thickness is 0.35mm, which is rarely used for the industrial. The Rate RM4.00/sft mentioned in the quotation is specifically for metal roof without the insulation replacement. The Claimant did not dispute the dismantling and reinstate back the Solar Panel's rate claimed by the Claimant. It is important to note that the rate of metal roof is not solely determined by the thickness but also considers the length of the metal roof and the brand which are factors in the overall cost.
>
> c) *It is crucial to emphasize that the Claimant has a duty of care towards the Respondent's property while carrying out the Contract works. Based on the aforementioned evidence, I have determined that the total affected area is 20,565 sft. Considering the limited information provided by the Claimant, I will adopt the rate provided by the respondent is adopted for the cost of the rectification.* Therefore, I allowed the Respondent's cross claim for the replacement of the new roof, insulation and the cost for dismantle and reinstate back the Solar Panels, amounting RM286,780.00.
>
> (emphasis added)

[53] We now look at both rates submitted by ABI (encl. 11/54) and TVA (encl. 11/57):

ABI's rate TVA's rate

ABI's rate

TVA's rate

[54] In its written submission dated 2 April 2024 (encl. 15), TVA submitted as follows in para. 4.43:

> 4.43 Had the Adjudicator given TRV an opportunity to present on these issues, TRV would have put forward evidence to clarify that the quote it had obtained was from the contractor who had originally installed the roof for the Premises, and that the original roof was 0.35mm thick and his quote included insulation, and more importantly, a substantial part of the roof originally were without insulation.

Note: TRV refers to TVA.

[55] ABI's rate was already available to TVA. As noted by the adjudicator, ABI had notified TVA the cost of replacement was RM12 psf. The adjudicator too had not come across any letter from TVA to ABI on any quotation prior to the proceeding. TVA had never in its adjudication claim and adjudication reply stated that the quotation was from the contractor who had originally installed the roof at the premises and failed to explain that the original roof was 0.35mm. It had also not explained that the quotation included insulation. This contrasts with that of ABI's rate which clearly

A stated it included installation. Hence, the adjudicator stated that "considering the limited information given by the claimant, I will adopt the rate provided by the respondent as the cost of the rectification".

[56] This cannot be a breach of natural justice in the sense that the adjudicator did not hear both sides of the dispute. Here, the adjudicator had
B not deprived both parties the right to adduce evidence and to submit on any issue. It is only after the adjudication proceeding that TVA is saying it should have been given the opportunity to explain further its rate when it did not address the adjudication that its quotation came from the original contractor.

C **[57]** In *Ireka Engineering And Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal* [2019] CLJU 51; [2019] 1 LNS 51, it was said as follows:

> [38] With respect, we disagreed. There are two limbs of the rules of natural justice, the first is that a man should not be the judge in his own
D cause (rule against bias) and the second is that the judge must hear both sides of the dispute (rule of *audi alteram partem*/right to be heard). Here we were concerned with the second limb which requires that both parties be accorded the opportunity to advance their case. In the context of section 15(b) of the CIPAA, the function of the court is to look at the manner in which the adjudicator conducted the hearing and whether he
E had accorded procedural fairness to the appellant …

[58] This essentially boils down to a dissatisfaction on the findings made by the adjudicator, which does not amount to a breach of natural justice.

[59] We add that pursuant to s. 25(d) of the CIPAA, the adjudicator shall have the power to draw on his own knowledge and expertise.

F

Conclusion On Setting Aside

[60] In all the circumstances, we find that TVA has not proved that the adjudication decision was improperly procured through fraud (s. 15(a) of the CIPAA) or that there has been a denial of natural justice (s. 15(b) of the
G CIPAA).

ABI's Cross-claim

[61] The above finding does not end the matter as the effect is that TVA, being the claimant, ends up being ordered to pay the respondent in the
H adjudication proceeding.

[62] In the adjudication decision, the first disputed issue was on whether ABI shall pay TVA outstanding work done in the sum of RM294,750. After perusing the various provisions in the contract and the CIPAA, the adjudicator determined in para. 4.2.1 (encl. 12/49) that:

I

> … Therefore, based on these provisions, **the Claimant is entitled to claim the outstanding work done amounting to RM294,750.00.**
>
> (emphasis added)

[63] The adjudicator then proceeded to decide the next disputed issue of whether ABI is entitled to file a cross-claim due to the damage caused by TVA in the construction work. The adjudicator noted TVA's contention that the cross-claim is not part of the contract. With regard to the damage to the roof, the adjudicator had allowed the claim and we have made substantive reference to it in our earlier paragraphs. At the end of the day, the adjudicator's decision on the adjudicated amount (encl. 12/51), which we reproduce again, was:

> **Adjudicated Amount**
>
> In the given circumstances, my decision is that the Claimant has **not succeeded** in their overall claim. The breakdown of my decisions is as follows:

Item	Description of Works Done	Amount (RM)	Total Amount (RM)
1.	Outstanding work-done	294,750.00	
2.	Cross-claims		
	a) Replacement of metal roofing works	(286,780.00)	
	b) Supply materials and labours to repaint warehouse	(15,800.00)	
	Outstanding amount due to claimant		(7,830.00)

[64] Parties were directed to file supplementary submissions on six issues from which we find that it will suffice to deal with two of those issues.

First Sub-issue – Whether ABI, Being The Respondent, In Responding To TVA's Adjudication Claim Can File A Cross-claim And If So, Whether The Cross-claim Can Exceed TVA's Claim Thereby Making ABI The Substantive Claimant

[65] Both parties were on common ground that ABI can file a cross-claim to resist TVA's claim. TVA added that this is as long as such a cross-claim is within the adjudicator's jurisdiction.

[66] We find and agree that ABI can indeed file a cross-claim in responding to TVA's claim. We refer to *Construction Adjudication in Malaysi*a 2nd edn by Lam Wai Loon and Ivan YF Loo, Sweet & Maxwell at pp. 142 and 143:

> **What Defences May Be Raised In Payment Response?**
>
> [5.011] Generally, a non-paying party is entitled to advance any ground which would amount in law or in fact to defence of the payment claim under a construction contract. … In addition, the non-paying party may resist the payment claim by raising a set-off, cross-claim, deduction from the advance payment previously paid and/or abatement.

[67] In *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22, the Federal Court held that the defences in the form of set-offs and cross-claims in the payment response can be considered as long as the adjudicator keeps within jurisdiction. At pp. 504 to 506 (CLJ); pp. 31 to 33 (MLJ), the following was said:

> [56] In short, s. 27(1) of CIPAA refers to the subject matter of the claim under s. 5 of CIPAA, which is the "cause of action" identified by the claimant by reference to the applicable clause of the construction contract. *Thus if the payment claim relates to Progress Claim No. 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to Progress Claim No. 28.*
>
> …
>
> [58] In contrast to jurisdiction, the "powers" of the adjudicator are listed in ss. 25 and 26 of CIPAA under the specific heading of "Powers of the Adjudicator". *It follows that an adjudicator may exercise all or any of the powers under ss. 25 and 26 of CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject-matter referred to him pursuant to ss. 5 and 6 of CIPAA.*
>
> …
>
> [62] Useful reference can also be made to the observation of learned authors of Lam Wai Loon and Ivan Y.F. Loo in *Construction Adjudication in Malaysia* (KL CCH Asia 2013) wherein they observe at p. 150 that the effect of s. 6(4) of CIPAA is that it does not prevent the respondent from submitting any defence available to him by way of an adjudication response.
>
> …
>
> [65] We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd. v. Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At [24-28] the learned judge observed:
>
> > …
> >
> > 25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in Broadwell. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. *But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.* (emphasis added)

[68] As to whether the cross-claim can exceed the claim, we are of the view (subject to our conclusions in paras. 79, 81, 83 and 84 herein) that the cross-claim can only reduce or zerorise TVA's claim. We were referred to *Mudajaya Corporation Bhd v. KWSL Builders Sdn Bhd & Other Cases* [2022] MLJU 1931, where at para. 29, the learned High Court Judge stated as follows:

> [29] … Even if it is assumed that a respondent can set off and/or counterclaim against a claimant in an adjudication proceedings based on the same construction contract (which is the basis for the claim in the adjudication proceedings), *I am of the view that the respondent, at the most, can only zeroise the claim but cannot counterclaim from the claimant for an amount which exceeds the sum claimed in the adjudication proceedings.* My reasons are as follows:
>
> (1) *the wording in s. 6(2) CIPAA only allows a respondent to, at the most, dispute "wholly" the claim in an adjudication proceedings;*
>
> (2) *by virtue of s. 27(1) CIPAA, an adjudicator's jurisdiction is "limited" to matters referred to adjudication by the parties in, among others, the PR. If a respondent, at the most, can only zeroise a claim in an adjudication proceedings under s. 6(2) CIPAA, according to s. 27(1) CIPAA, the adjudicator cannot then have jurisdiction to adjudicate a counterclaim by the respondent which exceeds the amount in the PC;*
>
> (3) *s. 10(1) CIPAA only allows a respondent to serve an AR which "shall answer" an AC. There is nothing in s. 10(1) CIPAA which permits a respondent to counterclaim from the claimant for a sum which exceeds the sum claimed in the adjudication proceedings;* and
>
> (4) *the Object (CIPAA) is to assist the cashflow of parties who have performed construction work. It is not the purpose of CIPAA to enable parties to claim for damages for breach of construction contracts and/or torts regarding construction work The Object (CIPAA) is not attained if a respondent is permitted to counterclaim from the claimant for a sum which exceeds the amount claimed in the adjudication proceedings. This is because if an adjudicator is allowed to adjudicate a respondent's counterclaim sum which is in excess of the amount claimed in the adjudication proceedings, this will result in a protracted and costly adjudication proceedings.* (emphasis added)

[69] We agree with and approve the reasoning of the High Court as set out above and find them to be cogent reasons supported by legal basis as to why a cross-claim can only reduce or zerorise a claim. Other than the legal basis, the object of CIPAA as per its preamble to facilitate regular and timely payment and as is usually said, to ease the cash flow, will not be attained. Protracted and costly adjudication proceedings will ensue when a cross-claim in excess of the claim is allowed. The efficacy of adjudication proceedings will be frustrated. Under the circumstances, ABI can never be the substantive claimant.

[70] That part of the judgment was not *obiter*, as contended by ABI. This is because it was one of the questions to be determined in the judgment in para. 16(e), namely "whether MCB could counterclaim from KWSL in the adjudication proceedings for a sum which exceeded the amount claimed by KWSL in the adjudication proceedings".

[71] Our attention was also drawn to a judgment dated 14 September 2016 in *Tenaga Poly Sdn Bhd v. Crest Builder Sdn Bhd* (KLHC Originating Summons No: WA-24C-44-06-2016), where a declaration was granted that:

> 2.2 A non-paying party may raise a defence of Liquidated and Ascertained Damages ("LAD") as a set-off to the unpaid party's claim, and if accepted by the adjudicator, the unpaid party's claim may be zerorised, but not to the extent where the unpaid party would be made to pay the non-paying party;

We are mindful that there are no written grounds but we would think that this lends some measure of support to the reasoning in *Mudajaya Corporation.*

[72] ABI had relied on *Bouygues UK Ltd v. Dahl-Jensen UK Ltd* [1999] Lexis Citation 3672, where the respondent had raised a counterclaim that exceeded the amount of the main claim. That case had its own peculiar facts where both parties had served its notice to adjudicate and it was agreed that Bouygues' claim was to be treated as a counterclaim to Dahl-Jensen's claim. We prefer *Mudajaya Corporation*'s clear and cogent reasons with its legal basis.

[73] ABI had stated that s. 6 of the CIPAA does not limit the non-paying party's right to raise a cross-claim that exceeds the unpaid party's claim and that s. 12(5) does not similarly limit the jurisdiction of the adjudicator. We have earlier stated that we agree with and approve the reasons in *Mudajaya Corporation* and add that those reasons have considered other provisions in CIPAA.

[74] It was also contended that this issue of whether ABI can raise a cross-claim or whether the cross-claim can exceed the claim was never raised in the adjudication proceedings. From the adjudication decision, the adjudicator noted TVA's contention that the cross-claim is not part of the contract, which necessarily entails the issue of whether ABI can raise the cross-claim. As to whether the cross-claim can exceed the claim, this is a legal issue.

Second Sub-issue – Whether Such A Cross-claim Can Be Based On Breaches – Breach Of Contract Or Negligence

[75] As was noted in *View Esteem* (paras. 56 and 58) and contended by TVA, the cross-claim has to be within the jurisdiction of the adjudicator pursuant to s. 27(1) of the CIPAA so that he adjudicates only the subject matter pursuant to s. 5, which is the payment claim and s. 6, which is the payment response. Section 27(1) states as follows:

27 Jurisdiction of adjudicator

(1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

[76] TVA's payment claim (encl. 5/7-8) was premised on the total value of work done in phase 1 of the contract. ABI's payment response (encl. 11/141-145) was premised on failure to observe and perform the contractual obligations and duties. In para. 2(a), it was on negligence and para. 1(b) on breach of contractual obligation in not carrying out the work with reasonable care. The adjudicator found for ABI as TVA "had a duty of care towards the property while carrying out the contract works".

[77] This would render it a contractual obligation whereby TVA in carrying out the installation of the SPS had a duty of care not to damage the roof. This is based on the breach of the same contract and ties in with the payment claim which was premised on the contract.

[78] Even if there was for negligence, it arose out of the same transaction and is closely connected with the payment claim for the installation work. In equity, ABI has a right to set-off the cross-claim, where it arises out of the same transaction. We refer to *Geldof Metaalconstructie NV v. Simon Carves Ltd* [2010] EWCA Civ 667, where with regard to the jurisprudence of set-off, where it was said as follows:

[43] In my judgment, this jurisprudence allows the following conclusions:

(i) …

(ii) There is clearly a formal requirement of close connection. …

(iii) …

(iv) There is also clearly a functional requirement whereby it needs to be unjust to enforce the claim without taking into account the cross-claim. …

[79] We find that ABI would have satisfied the requirement of connection between the claim and cross-claim as both are related to the claim on completion of work and arise from the same contract. It would also be unjust that ABI would have to incur the cost arising from TVA's negligence. This is subject to the cross-claim not exceeding the claim.

Outcome

[80] As TVA has not succeeded in its setting aside of the adjudication decision on the grounds of fraud or denial of natural justice, that adjudication decision, including allowing the cross-claim, remains valid. The cross-claim arises from a breach of duty of care under the contract.

[81] As the cross-claim can only reduce or zerorise TVA's claim and cannot exceed TVA's claim, we find that the adjudicator acted in excess of jurisdiction to find that "**the outstanding amount due to the claimant** (which is TVA) is **(7,830)**" (emphasis added). This would bring it within the ground in s. 15(d) of the CIPAA, where an adjudication decision can be set aside on the grounds that "the adjudicator has acted in excess of his jurisdiction". However, it is critical for us to highlight that this was not relied on as a ground for the setting aside application. Rather, the grounds were premised on fraud and a denial of natural justice, which are s. 15(a) and (b) of the CIPAA. Section 13(a) of the CIPAA makes it clear that the adjudication is binding unless it is set aside on any of the grounds referred to in s. 15.

[82] We refer to *View Esteem* as to what constitutes an excess of jurisdiction. At pp. 32 and 32, it was stated:

> [12] … as it failed to distinguish *between a case where CIPAA did not apply at all and a case where the CIPAA applies but the adjudicator acting under the CIPAA had exceeded his jurisdiction. Section 15 of the CIPAA refers to the latter. Section 15 is predicated on the CIPAA applying to the case and to an adjudication made under the CIPAA. It relates specifically to a complaint that the adjudicator had 'acted in excess of his jurisdiction' presupposing the adjudicator's jurisdiction under the CIPAA in the first place.*
>
> …
>
> 15] *We are of the view in substance, the 'jurisdiction' spoken of in s. 15(d) of the CIPAA are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction*. … (emphasis added)

[83] In this instance, there was jurisdiction for the adjudicator to consider the issue of cross-claim but not to render an award where the cross-claim exceeded the claim itself. Although we had allowed the issue of whether the cross-claim can exceed the claim as a legal point to be raised, this ultimately resulted in an excess of jurisdiction situation, which ground however, was not pleaded for a setting aside.

[84] Further, the issue of excess of jurisdiction was not raised in the memorandum of appeal.

[85] We are therefore constrained to dismiss the appeal with costs of RM10,000 to ABI subject to allocatur.

Appeal 1948 – Enforcement

[86] As the setting aside appeal has been dismissed, it follows that the enforcement appeal ought to be likewise dismissed. We award costs of RM10,000 to ABI subject to allocatur.